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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No ~~301.~~ ~~30~~ 42

ELIZA D. PRITCHARD, EXECUTRIX OF RICHARD PRITCHARD, DECEASED, PLAINTIFF IN ERROR.

VS.

EX NORTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

F[illegible] OCTOBER 7, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 301.

ELIZA D. PRITCHARD, EXECUTRIX OF RICHARD PRITCHARD, DECEASED, PLAINTIFF IN ERROR,

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

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a UNITED STATES OF AMERICA:

Circuit court of the United States for the 5th judicial circuit and district of Louisiana.

ELIZA D. PRITCHARD, EXECUTRIX,
vs.
EX NORTON. } No. 8099.

Henry C. Miller, attorney for Eliza D. Pritchard, executrix, plaintiff in error.

J. Ad Rozier & Vallé J. Rozier, att'ys for Ex Norton, defendant in error.

TRANSCRIPT OF RECORD.

Writ of error, returnable in the Supreme Court of the United States at Washington City, D. C., on the 2d Monday of October, 1879.

1 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

ELIZA D. PRITCHARD, EXECUTRIX,
vs.
EX NORTON. } No. 8099.

Petition.—Filed February 14th, 1877.

To the honorable the judges of the circuit court of the United States for the fifth circuit and district of Louisiana:

The petition of Eliza D. Pritchard, executrix of the estate of Richard Pritchard, a citizen of the State of Louisiana, and a resident of the city of New Orleans, respectfully represents:

That Ex Norton, a citizen of the State of New York, is justly indebted unto the estate of Richard Pritchard in the full sum of forty-seven hundred and seventy-six $\frac{60}{100}$ dollars ($4,776.60), with inter-
2 est at the rate of five per cent. per annum from judicial demand till paid, for this:

That on the 26th day of December, 1871, J. P. Harrison, jr., filed a petition in the seventh district court for the parish of Orleans, State of Louisiana, claiming from the New Orleans, Jackson and Great Northern Railroad Company the sum of one hundred thousand dollars ($100,000.00) damages for a breach of contract; that an answer was filed by the said railroad company, and after due proceedings the plaintiff, J. P. Harrison, jr., recovered judgment against the said defendant, the New Orleans, Jackson and Great Northern Railroad Company, for the sum of thirty-eight thousand eight hundred and seventy-six $\frac{20}{100}$ dollars ($38,876.20), with legal interest from judicial demand, and that judgment was entered November 5th, 1872, all of which will more fully appear from the record of said suit entitled J. P. Harrison, jr., vs. New Orleans, Jackson and Great Northern Railroad Company, No. 9261 of the docket of the seventh district court for the parish of Orleans, State of Louisiana.

3 Represents that the said defendant, the New Orleans, Jackson and Great Northern Railroad Company, took a suspensive appeal from said judgment, returnable to the supreme court of Louisiana on or before the , day of , 137, and in accordance with the terms on which said appeal was granted the said defendant signed a bond, through its proper officer, H. S. McComb, pres't, with Richard Pritchard, E. H. Summers, and Edmond J. Forstall, as sureties thereon, all of which will more fully appear from authentic copy of said bond annexed to and made part hereof.

Represents that on the 22d day of May, 1876, the supreme court of the State of Louisiana rendered a decree which became final on the 30th day of May, 1876; that by the terms of said decree the judgment of the court a qua was reduced from the sum of thirty-eight thousand eight hundred and seventy-six $\frac{20}{100}$ dollars ($38,876.20) to the sum of seventy-five hundred dollars ($7,500.00), with interest from the day of , 1871.

4 Represents that on the 28th day of July, 1876, the said Richard Pritchard departed this life, and his succession has been duly opened in the parish of Orleans, and your petitioner appointed and qualified as executrix, and as such is administering said estate.

Represents that on the day of , 1876, the Mechanics' and Traders' Insurance Company was subrogated to the rights of J. P. Harrison, jr., in the said cause, entitled J. P. Harrison vs. The New Orleans, Jackson and Great Northern Railroad Company, and that the Mechanics' and Traders' Insurance Company issued execution against defendant and succeeded in collecting the sum of thirty hundred and fourteen dollars ($3,014.00) by garnishment process against a debtor of the said defendant; that subsequent thereto the sheriff made return of no property found and that defendant was insolvent, and that thereupon, E. Forstall and E. H. Summers being dead, and their estates being insolvent, the Mechanics' and

5 Traders' Insurance Company issued execution against the estate of Richard Pritchard, and that your petitioner, as executrix, was forced to and did pay, on the 9th day of February, 1877, the sum of forty-seven hundred and seventy-six $\frac{60}{100}$ dollars ($4,776.60).

Represents that on the 13th day of June, 1874, after the signature of the appeal bond aforesaid, by the said Richard Pritchard, as surety, H. S. McComb, then president of the New Orleans, Jackson and Great Northern Railroad Company, individually, together with Ex Norton, of the city of New York, State of New York, executed a joint and several bond in favor of Richard Pritchard, in the sum of fifty-five thousand dollars ($55,000.00), which bond is annexed to and made part hereof.

Represents that by the terms of said bond the said H. S. McComb and the said Ex Norton obligated themselves in solido to hold the said Richard Pritchard harmless as surety on said bond of appeal executed in behalf of said New Orleans, Jackson and Great Northern Rail-

6 road Company; and that in the event the said Richard Pritchard should have to pay any sum or sums of money on account of his liability as surety aforesaid then they, H. S. McComb and Ex Norton, or either of them, would refund to the said Pritchard all such sum or sums of money paid by said Pritchard on account of said liability as surety.

Represents that the judgment aforesaid on the 9th day of February, 1877, of forty-seven hundred and seventy-six $\frac{60}{100}$ dollars ($4,776.60), by your petitioner, as executrix of the estate of Richard Pritchard, was the happening of the condition upon which the said bond was to become

exigible, and the said H. S. McComb and the said Ex Norton have become bound to your petitioner, in her representative capacity aforesaid, in the full sum of *of* forty-seven hundred and seventy-six $\frac{60}{100}$ dollars. Wherefore petitioner prays that Ex Norton be cited to appear and answer this petition, and that, due proceedings being had, your petitioner have judgment against said Norton for the full sum of forty-seven
7 hundred and seventy-six $\frac{60}{100}$ dollars ($4,766,60), with interest at the rate of five per cent. per annum from judicial demand until paid costs of court and general relief.

(Signed) JOHN H. NEW, *Att'y.*

Citation to Ex Norton.

The President of the United States of America to the marshal of the district of Louisiana, greeting:

ELIZA D. PRITCHARD, EX'X, *vs.* EX NORTON. } No. 8099.

You are hereby commanded to summon Ex Norton, a citizen of the State of New York, to comply with the demand of Eliza D. Pritchard, executrix of the estate of Richard Pritchard, a citizen of the State of Louisiana, contained in the petition, of which a copy accompanies this citation, or to deliver her answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days
8 after service hereof, or judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held; and that you make due return hereof on the first Monday of March, 1877.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 14th day of February, A. D. one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the 101 year.

[SEAL.] (Signed) F. B. VINOT, *Dy Clerk.*

Marshal's return.

Received Feb. 14, 1877, by the U. S. marshal, and on the 20th day of Febr'y, 1877, served a copy hereof, with accompanying petition, on Ex Norton, within named, by handing the same to him in person in the city of New Orleans.

(Signed) S. W. REED, *Dy Marshal.*

9 *Exception.—Filed March 3d, 1877.*

Circuit court of the United States.

ELIZA D. PRITCHARD, EX., *vs.* EX NORTON. }

Ex Norton, defendant in the above-entitled cause, excepts to the petition of laipntiff in this cause, and prays the judgment of the court

whether he shall be compelled to answer the said petition of plaintiff; and defendant sets forth the following grounds:

1st. Defendant excepts to the petition of plaintiff aforesaid, and says that the said petition discloses no cause of action against defendant.

II. That the allegations in said petition touching her alleged appointment as executrix of said Richard Pritchard are vague and uncertain. It is not set forth or pretended that the said Richard Pritchard has left a will, or that if any will has been left by him that the same has been probated in a competent court, nor is it alleged that by any such supposed probate of a will that she was therein appointed ex'x of said Rich'd Pritchard. That the said plaintiff has failed to make profit of any letters testamentary. Defendant denies that the said plaintiff has been appointed ex'x of the said Pritchard, and denies that she has any capacity to appear herein as alleged ex'x of Richard Pritchard.

10 III. That all that portion of the petition of plaintiff wherein it is alleged that an execution was issued against the succession of Rich. Pritchard in favor of the Mechanics' & Traders' Insurance Comp'y is vague & uncertain, and defendant by reason of said defectiveness cannot safely answer the said petition; that if plaintiff sets up that any judgment was rendered against the succession of Rich. Pritchard in favor of the Mechanics' & Traders' Insurance Comp'y is vague and uncertain, and defendant by reason of said defectiveness cannot safely answer the said petition; that if plaintiff sets up that any judgment was rendered against the succession of the said Rich. Pritchard, then and in that case the plaintiff must be required to specify said alleged judgment, with sufficient particulars of time, place, and court, so that defendant may be enabled to answer said petition safely. Should these exceptions be overruled and set aside defendant reserves his right to answer said petition. Wherefore defendant prays the judgment of this honorable court whether he is bound to answer the said petition of plaintiff herein, and prays that the foregoing exceptions be maintained, and that the petition of plaintiff be dismissed.

J. AD ROZIER,
VALLÉ J. ROZIER,
Attorneys for Defendant.

Motion and order.—Exception dismissed.—Extract from the minutes, Nov. term, 1876.

NEW ORLEANS, *Tuesday, March 6th*, 1877.

Court met pursuant to adjournment.

11 Present, Hon. E. C. Billings, district judge.

E. D. PRITCHARD *vs.* EX NORTON. } No. 8099.

On motion of John H. New, attorney for plaintiff, and on showing to the court that the exceptions herein filed are dilatory, and that the same are not sworn to, as required by the orders and rules of this hon'ble court—

It is ordered that the same be dismissed, and that defendant file his answer within twenty-four hours according to the rules of this hon. court—

Motion & order, exception reinstated and fixed.—Extract from the minutes, Nov'r term, 1876.

NEW ORLEANS, *Wednesday, March 7*, 1877.

Court met pursuant to adjournment.
Present, Hon. Wm. B. Woods, district judge.

ELIJAH D. PRITCHARD
vs.
EX NORTON. } No. 8099.

12 By consent of the attorneys here present, the order made on yesterday dismissing the exceptions is set aside, and said exceptions reinstated and fixed for hearing on 13th instant at 11 o'clock a. m.

Submission of exception.—Extract from the minutes, Nov. term, 1876.

NEW ORLEANS, *Tuesday, March 13th*, 1877.

Court met pursuant to adjournment.
Present, Hon. E. C. Billings, district judge.

ELIZA D. PRITCHARD
vs.
EX NORTON. } No. 8099.

The exception herein was called for trial.

John H. New, for plaintiff.
J. Ad Rozier, for exceptor.
And after hearing argument the court took time to consider.

Order on exception.—Extract from the minutes, Nov'r term, 1876.

NEW ORLEANS, *Wednesday, March 28th*, 1877.

Court met pursuant to adjournment.
Present, Hon. E. C. Billings, district judge.

13 ELIZA D. PRITCHARD
vs.
EX NORTON. } No. 8099.

Ordered that the first and second ground of the exception be overruled, and the third ground sustained, with leave to plaintiff to amend the petition without reingrossing, by inserting the word "said" in line 16, page 3.

Answer.—Filed April 4, 1877.

Circuit court of the United States for the fifth judicial circuit and district of Louisiana.

ELIZA D. PRITCHARD, EX'X,
vs.
EX NORTON. } No. 8099.

Ex Norton, defendant, for answer to the petition of plaintiff herein,

denies all and singular the allegations therein contained, except as hereinafter specially admitted.

Defendant admits his signature to the bond in favor of Richard Pritchard, and which is declared on, in the petition of plaintiff.

14 and for which oyer was prayed.

Defendant specially denies that the Mechanics' and Traders' Insurance Company ever obtained a judgment against the estate of Richard Pritchard or against the plaintiff in any representative capacity whatever; that if it should be established in proof that any judgment was rendered and an execution was issued by virtue thereof, as alleged by plaintiff, then and in that case defendant says that it was through the fault and negligence of said plaintiff that any judgment was rendered against her, in her representative capacity or against the estate of Richard Pritchard; that she could have successfully defended herself and the succession of Richard Pritchard against any such proceedings; that the plaintiff could have pointed out to the civil sheriff of the parish of Orleans property belonging to said New Orleans, Jackson and Great Northern Railroad, within the jurisdiction of the court and sheriff, amply sufficient in value to satisfy any judgment which J. P. Harrison, jr., or the Mechanics' and Traders' Insurance Com-

15 pany may have recovered against the said New Orleans, Jackson and Great Northern Railroad Company, and when sold by the civil sheriff the proceeds would have been more than ample to satisfy any such judgment; that the sheriff of the parish of Orleans did not make a demand of the said railroad company, nor of the said Harrison or Mechanics' and Traders' Insurance Company, to point out property; had this been done, property of said railroad company, defendant, could have been pointed out to the sheriff, and the execution which may have issued could have been satisfied out of said property.

Defendant alleges that it wholly resulted and was through the fault and negligence alone of the said plaintiff herein or the said Richard Pritchard that this was not done; had they taken the proper precautions and given proper attention and care to this business and matter the said plaintiff or the estate of Richard Pritchard could never have been called on to pay or expend any sum of money by reason of

16 the said Richard Pritchard having signed or executed the alleged bond mentioned in the said petition; that they, said Richard Pritchard and the plaintiff, were bound to take all such measures and do and act in the matter, so that no recourse could have been had on defendant or no demand made against him by reason of his having signed the aforesaid bond in favor of the said Richard Pritchard.

That the said plaintiff and the succession of the said Richard Pritchard, in case it should be shewn that they have been forced to pay any sum of money as alleged in their petition, then they failed to subrogate this defendant to all and any rights of mortgage which the said J. P. Harrison, jr., and the Mechanics' and Traders' Insurance Company may have had by and in virtue of any judgment recovered by them against the said railroad company; that they were bound, in case of any such payment on their part, to have subrogated this defendant to all the rights and mortgages and privileges which the said Harrison and the Mechanics' and Traders' Insurance Company had against the

17 said New *New* Orleans, Jackson and Great Northern Railroad Company.

Wherefore defendant prays that the demand of plaintiff be rejected; and that the plaintiff be condemned to pay costs of suit.

(Signed) J. AD ROZIER,
VALLÉ J. ROZIER,
Attorneys for Ex Norton.

Supplemental answer.—Filed April 17, 1877.

Circuit court of the United States, district of Louisiana.

ELIZA D. PRITCHARD, EXECUTOR, PLANTIFF,
vs.
EX NORTON, DEFENDANT. } No. 8099.

The supplemental answer of Ex Norton, defendant in the above-entitled cause, Eliza D. Pritchard, executrix of Richard Pritchard, plaintiff, vs. Ex Norton, defendant, in addition to the averments contained in the answer herein of the said Ex Norton, defendant, sets forth as follows:

The said Ex Norton, defendant, in addition to the averments contained in his answer herein, alleges that there was no consideration
18 for the instrument of writing sued on herein, dated the 13th day of June, A. D. 1874, in the county of New York, State of New York, and which the plaintiff styles a bond executed by H. S. McComb and Ex Norton.

That the said instrument of writing styled by plaintiff a bond was executed and delivered in the State of New York to the said Richard Pritchard without there being any consideration passing whatever, and that by the laws of the State of New York the said instrument of writing styled by plaintiff a bond is "nudum pactum" and is of no validity whatever by reason of want of consideration.

Wherefore defendant prays that he may have leave to make and file this supplemental answer, and that defendant prays as he has done in his answer that the demand of plaintiff be rejected and that plaintiff be condemned to pay costs.

(Signed) J. AD ROZIER,
VALLÉ J. ROZIER,
Attorney of Defendant.

19 *Hearing & verdict.—Extract from the minutes, April term, '79.*

NEW ORLEANS, *Tuesday, May 20th*, 1879.

Court met at 10 o'clock a. m.
Present, Hon. E. C. Billings, dist. judge.

ELIZA D. PRITCHARD, EX.,
vs.
EX NORTON. } No. 8099.

This cause came on for trial, Henry C. Miller for plaintiff, J. Ad Rozier & Vallé J. Rozier and Thos. J. Semmes for defendant.

When the following jurors were called and sworn to try the issue:

1. H. H. PIEMAN.
2. G. M. BAYLY, JR.
3. A. K. BROWN.
4. W. EBERT.
5. F. DIETRICH.
6. W. B. KRUMBHAAR.
7. T. TAYLOR.
8. A. LAMBERT.
9. C. TYLER.
10. M. T. BOYLSON.
11. D. DONOVAN.
12. W. M. BATCHELOR.

And the jury being complete, the court appointed W. B. Krumbhaar foreman, and the trial proceeded; and after hearing the pleadings, evidence, and argument, and receiving a charge from the court, the cause was submitted to the jury, who thereupon, through their said fore-
20 man, did then and there, in open court, render the following verdict, to wit:

We, the jury, find verdict for the defendant.

May 20th, 1879.

(Signed) W. B. KRUMBHAAR,
Foreman.

Whereupon it was ordered that the said verdict be recorded, and it is done accordingly.

Note of evidence.—Filed May 20, 1879.

Plaintiff offered certificate of death of Richard Pritchard, appointment of Mrs. Pritchard as ex'x, record 9261, 7th dist. court, the appeal bond therein furnished showing that R. Pritchard signed the bond as surety.

The transfer by J. P. Harrison of his judgment in 7th dist. court to Me'ch. & Traders' Ins. Co., & the subrogation of record, the issuing of the execution in that judgment by the subrogated plaintiff upon the judgment as amended by the decree sup. court, the payment by Pritchard, surety on appeal bond, the indemnity bond signed by Ex Norton sued in the date of that bond being subsequent to date of appeal bond.

De'f'ts offer statute of N. Y. allowing evidence to be introduced in regard to the consideration of sealed instruments. (2 N. Y. R. S., 406, 653, sec. 107.) Signatures Ex Nor. and H. S. McComb.

21 *Verdict & judgment.*

Circuit court of the United States, fifth circuit and district of Louisiana.
April term, 1879.

NEW ORLEANS, *Tuesday, May* 20, 1879.

Court met pursuant to adjournment.

Present, Hon. Edward C. Billings, dist. judge.

ELIZA D. PRITCHARD, EX'X,
vs.
EX NORTON. } No. 8099.

By reason of the verdict of the jury herein and in accordance therewith, it is ordered, adjudged, and decreed that there be judgment in favor of the defendant with costs.

Judgment rendered May 20th, 1879.

Judgment signed May 24th, 1879.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bill of exception No. 1.—*Filed May* 24, 1879.

ELIZA D. PRICHARD, EX.
vs.
EX. NORTON. } No. 8099. U. S. circuit court.

Be it remembered that on the 20th May, 1879, on the trial of

22 this cause, the plaintiff having offered in evidence the appeal bond furnished in the case of J. P. Harrison, jr., vs. The New Orleans, Jackson and Great Northern Railroad Company, and the bond of indemnity sued upon in this cause, copies whereof are hereto attached and marked A and B, and the defendant having offered the testimony of H. S. McCoomb and Ex Norton, tending to prove that said appeal bond was not signed by the surety therein, Richard Pritchard, at the instance or request of Henry S. McCoomb and Ex Norton or either, nor did any consideration pass between the said McCoomb and Norton for their signing and executing the said indemnifying bond, and after the defendant had offerred in evidence the statutes of New York (2 R. S., 406, sec. 77), wherein it is enacted that in every action upon a sealed instrument the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner *or of* the instrument were not sealed, provided such defence be pleaded, and it appearing by the bonds that the indemnifying bond was executed in New York, the appeal bond having
23 been executed here, thereupon the counsel for the defendant requested the court to charge the jury that the indemnifying bond in respect to its validity and the considerations requisite to support it was to be governed by the law of New York and not of Louisiana, which instructions was objected to by the counsel for plaintiff on the ground that the place of performance contemplated by the indemnifying bond was to be deemed in New Orleans, where the appeal bond was executed and said Pritchard resided; but the court overruled the said objections and gave such instructions; to which ruling of the court, and to said instructions given to the jury at the request of defendant's counsel, the plaintiff, by her counsel, then and there excepted, and tendered this bill of exception for signature, which is signed and sealed accordingly,

and the counsel for defendant further requested the court to charge the jury that if they believed from the evidence that the appeal bond
24 signed by Richard Pritchard as surety, and given in evidence, was not signed by him at the instance or request of Henry S. McComb and Ex Norton, or of either, and that no consideration passed between the said Prichard and the said McCoomb and Pritchard for the signing and execution of said indemnifying bond by the said McCoomb and Norton, then the jury are instructed that said bond is void for want and abscence of any consideration valid in law to sustain it, and no recovery can be had upon said bond; to which charge the plaintiff, by her counsel, objected on the point that the liability of R. Pritchard as surety on the appeal bond was a good and sufficient consideration to support the bond of indemnity and the obligations it expresses; but the court overruled the objections, because the liability of said R. Pritchard as surety on the appeal bond had been incurred by him prior to the execution of said bond of indemnity, and because there was testimony to the effect that neither the defendant Norton or
25 McCoomb had requested the said Pritchard to sign said appeal bond, the court instructing the jury at the same time that the burden and charged as requested, to which ruling of the court and to the charge as given the counsel for the plaintiff then and there excepted, and tendered this bill of exceptions, which is signed and sealed accordingly this 20th May, 1879.

[SEAL.] (Signed) EDWARD C. BILLINGS, *Judge.*

Document marked A, referred in the bills of exception marked 1 *and* 2.

Know all men by these presents that we, The New Orleans, Jackson and Great Northern Railroad Company, as principal, and Richard Pritchard, E. J. Forstall, E. H. Summers, as sureties, are held and firmly bound unto A. D. Bernoudy, the clerk of the seventh district court for the parish of Orleans, his successors, executors, administrators, and assigns, in the sum of fifty-five thousand dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators firmly by these presents. Sealed with our seals and dated
26 in the city of New Orleans on this day of 20th November, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas the above-bounden The New Orleans, Jackson and Great Northern Railroad Company this day filed a motion of appeal from a final judgment rendered against them in the matter of J. P. Harrison vs. The New Orleans, Jackson and Great Northern Railroad Company, No. , in the fifth district court for the parish of Orleans, on the 5th day of November, 1872, and signed on the 19th day of Nov., 1872:

Now, the condition of the above obligation is such that the above-bound The New Orleans, Jackson and Great Northern Railroad Co. shall prosecute its said appeal, and shall satisfy whatever judgment may be rendered against it, or that the same shall be satisfied by the proceeds of the sale of its estate, real or personal, if be cast in the appeal; otherwise, that the said Pritchard et als, sureties, shall be liable place.

THE NEW ORLEANS, JACKSON & GREAT NORTHERN RAILROAD CO.,

(S'g'd) P'r L. E. SIMONDS. [L. S.]
(S'd) RICHARD PRITCHARD. [L. S.]
" E. H. SUMMERS.
" E. J. FORSTALL.

27 *Document marked B, referred in the bills of exception Nos.* 1 *and* 2.

STATE OF NEW YORK,
County of New York:

Know all men by these presents that we, Henry S. McComb, of Wilmington, State of Delaware, and Ex Norton, of the city of New York, State of New York, are held and firmly bound, jointly and severally, unto Richard Pritchard, of New Orleans, his executors, administrators, and assigns, in the sum of fifty-five thousand ($55,000) dollars, lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, & administrators firmly by these presents. Sealed with our seals and dated this thirtieth day of June, A. D. eighteen hundred and seventy-four.

Whereas the aforesaid Richard Pritchard has signed an appeal bond as one of the sureties thereon, jointly and severally, on behalf of the defendant, appellant in the suit of J. P. Harrison, jr., vs. The New Orleans, Jackson and Great Northern Railroad Co., No. 9261 on
28 the docket of the seventh district court for the parish of Orleans:

Now, the condition of the above obligation is such that the aforesaid obligors shall hold harmless and fully indemnify the said Richard Pritchard against all loss or damage arising from his liability as surety

on the said appeal bond, then this obligation shall be null and void; otherwise, shall remain in full force and effect.

(S'g'd) H. S. McCOMB. [L. S.]

Witness:

(S'g'd) THOS. McCOMB.
" W. T. WILMANS.

(S'g'd) EX NORTON. [L. S.]

Witness:

(S'g'd) O. W. FARMER.
" EDW. G. STEELE.

Bill of exception No. 2.—Filed May 24th, 1879.

ELIZA D. PRITCHARD, EX., *vs.* EX NORTON. } No. 8099.

United States circuit court.

Be it remembered that on the trial of this cause, on the 20th May, 1879, the plaintiff having given in evidence the proof of death of Richard Pritchard; the order of court appointing her the executrix of the deceased, and her letters of executor-
29 ship, the last being herewith filed and made part of this bill, marked "D;" the petition and judgment in the suit of J. P. Harrison, jr., vs. The New Orleans, Jackson and Great Northern Railroad Company, No. , of the seventh district court of New Orleans, said judgment being for thirty-three thousand eight hundred and seventy-six $\frac{20}{100}$ dollars, with interest and costs; the petition and order for appeal therein; the appeal bond furnished to procure said appeal with R. Pritchard, E. J. Forstall, and E. H. Summers as sureties, copy whereof is hereto attached, marked "A," and made part of this bill; the decree of the supreme court reducing said judgment to seven thousand five hundred dollars, made part of this bill, marked "C," and after the plaintiff had offered , tending to prove that Richard Pritchard as the surety on the said appeal bond had been compelled to pay on account and on satisfaction of said judgments the sum of four thousand seven hundred and seventy-six $\frac{60}{100}$ dollars, the amount claimed in the petition herein, being the residue of said judgment after allowing credits, made an execution against said
30 company, the proof being made that at the date of said payment the other sureties on said bond were dead and insolvent; and after the plaintiff had given in evidence the bond sued upon in this case, executed after the execution of said appeal bond, copy of which bond is hereto attached as part of this bill and marked "B," the plaintiff having offered no evidence tending to prove any other consideration for the indemnity bond sued upon than that expressed on its face, to wit, that said Pritchard had signed said appeal bond as surety, and that the purpose and object of said indemnity bond was to secure and hold harmless said Pritchard from law or damage by reason of said appeal bond, and after defendant had offered evidence tending to prove that said appeal bond was not signed by the said Pritchard at the instance or request of the obligors named in said indemnifying bond or of either, nor did any consideration pass between said Pritchard and said Norton for their signing and executing said sued indemnifying

bond, and the defendant having introduced in evidence the statutes of New York (2 R. S., 406, section 77), wherein it is
31 enacted that in every action upon a sealed instrument the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner *or* if the instrument were not sealed, provided said defence be pleaded, thereupon the counsel for the plaintiff requested the court to charge the jury that if they found from the evidence that the consideration for the indemnifying bond sued upon in this case was the obligations contracted by Richard Pritchard as surety on the appeal bond furnished by the New Orleans, Jackson and Great Northern Railroad Company to obtain said appeal in the suit of J. P. Harrison, jr., vs. the said company in the 7th district court of New Orleans, and that the object of said indemnifying bond was to hold harmless and indemnify said Pritchard from law or damage by reason of or growing out of said appeal bond, then the jury are instructed that the consideration for said indemnifying bond was good and valid, and is competent to support this
32 action based upon said bond if Pritchard did sustain such law or damage, which charge the court refused to give; to which refusal to charge as requested the counsel for the plaintiff the*ir* and then excepted, and tendered this bill of exceptions for signature, which is signed and sealed accordingly this 20th June, 1879.

May 9, 1879.

[SEAL.] (Signed) EDWARD C. BILLINGS, *Judge.*

Document A, referred in the bill of exception, marked No. 2, and made part hereof.

Know all men by these presents that we, the New Orleans, Jackson and Great Northern Railroad Company, as principal, and Richard Pritchard, E. J. Forstall, E. H. Summers, as sureties, are held and firmly bound unto A. D. Bernoudy, the clerk of the seventh district court for the parish of Orleans, his successors, executors, administrators, and assigns, in the sum of fifty-five thousand dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators firmly by these presents, sealed with our seals and
33 dated in the city of New Orleans on this day of 20th November, in the year of our Lord one thousand eight hundred and seventy-two. Whereas the above-bounden the New Orleans, Jackson and Great Northern Railroad Company this day filed a motion of appeal from a final judgment rendered against them in the matter of J. P. Harrison vs. The New , Jackson and Great Northern Railroad Company, No. , in the fifth district court for the parish of Orleans, on the 5th day of November, 1872, and signed on the 19th day of Nov., 1872:

Now, the condition of the above obligation is such that the above-bound the New Orleans, Jackson and Great Northern Railroad Co. shall prosecute its said appeal, and shall satisfy whatever judgment may be rendered against it, or that the same shall be satisfied by the proceeds of the sale of its estate, real or personal, if be cast in the appeal; otherwise, that the said Pritchard et als, sureties, shall be liable place.

THE NEW ORLEANS, JACKSON & GREAT NORTHERN RAILROAD CO.,

(S'g'd) P'r L. E. SIMONDS. [L. S.]

34 RICHARD PRITCHARD. [L. S.]

E. H. SUMMERS.

E. J. FORSTALL.

Document B, referred in the bill of exceptions, marked No. 2 and made part hereof.

STATE OF NEW YORK,
County of New York:

Know all men by these presents that we, Henry S. McComb, of Wilmington, State of Delaware, and Ex Norton, of the city of New York, State of New York, are held and firmly bound, jointly and severally, unto Richard Pritchard, of New Orleans, his executors, administrators, and assigns, in the sum of fifty-five thousand ($55,000) dollars, lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, & administrators firmly by these presents. Sealed with our seals and dated this thirtieth day of June, A. D. eighteen hundred and seventy-four.

Whereas the aforesaid Richard Pritchard has signed an appeal bond as one of the sureties thereon, jointly and severally, on behalf
35 of the defendant, appellant in the suit of J. P. Harrison, jr., vs. The New Orleans, Jackson and Great Northern Railroad Co., No. 9261 on the docket of the seventh district court for the parish of Orleans:

Now, the condition of the above obligation is such that the aforesaid obligors shall hold harmless and fully indemnify the said Richard Pritchard against all loss or damage arising from his liability as surety on said appeal bond, then this obligation shall be null and void; otherwise, shall remain in full force and effect.

(S'g'd) H. S. McCOMB. [L. S.]
Witness:
(S'g'd) THOS. McCOMB.
" W. T. WILMANS.
" EX NORTON. [L. S.]
Witness:
(S'g'd) O. W. FARMER.
" EDW. G. STEELE.

Document C, referred in the bill of exception, marked No. 2 and made part hereof.

STATE OF LOUISIANA:

Fourth district court for the parish of Orleans.

36 I hereby certify that on the fifth day of November, 1872, judgment was rendered in the late seventh district court for the parish of Orleans in the following-entitled suit, in the words and figures following, to wit:

J. P. HARRISON
vs.
N. O., JACKSON & G. N. R'L R'D CO. } No. 9261.

For the reason assigned in the written opinion of the court, this day delivered and filed—

It is ordered, adjudged, and decreed that the plaintiff, J. P. Harrison, jr., do recover from defendants, the New Orleans, Jackson and Great Northern Railroad Company, the sum of thirty-three thousand eight hundred and seventy-six $\frac{20}{100}$ dollars, with legal interest from ju-

dicial demand and costs of suit, and that the demand and petition, so far as it may be understood as claiming damages incurred subsequent to the institution of the suit, be dismissed as in case of nonsuit.

Hon. T. WHARTON COLLENS, *Judge.*

[SEAL.] R. GLOVER,
Deputy Clerk Fourth District Court.

37 *Motion for suspensive appeal.—Extract from the minutes of the late seventh district court for the parish of Orleans.*

WEDNESDAY, 21*st November*, 1872.

Present, Hon. T. Wharton Collens, judge.

J. P. HARRISON, JR., *vs.* N. O., JACKSON & G. N. R. R'D CO. } No. 9261. 7th district court.

On motion of Hays & New & L. E. Simonds, defendants' attorneys, and on suggesting that defendant is aggrieved by the final judgment herein rendered on November 5th, 1872, and signed on Nov'r 19th, 1872—

It is ordered that a suspensive appeal to the supreme court of this State from the said judgment herein be allowed on giving bond, conditioned according to law in the sum of fifty-five thousand dollars; and there not being time enough to prepare the record of appeal by the next return day, it is ordered that said appeal be made returnable to the supreme court on the first Monday of January, 1873.

A true copy from the minutes of the late seventh district court.

38 (Signed) R. GLOVER,
Dy Clerk 4th District Court.

J. P. HARRISON, JR., *vs.* NEW ORLEANS, JACK. & G. N. RAILROAD COMPANY. } No. 4482.

Judgment and decree.

MONDAY, *May 22d*, 1876.

The court was duly opened pursuant to adjournment. Present, their honors John T. Ludeling, chief justice, James G. Taliafero, Rufus K. Howell, William G. Wyly, Philip H. Morgan, associate justices.

On appeal from the seventh district court for the parish of Orleans.

It is ordered, adjudged, and decreed that the judgment of the district court be amended by reducing the amount thereof from thirty-three thousand eight hundred and seventy-six $\frac{20}{100}$ dollars to seven thousand five hundred dollars; and that as thus amended the judgment be affirmed, defendants to pay costs in the court below,

39 plaintiff to pay those of appeal.

Document D, referred to in the bill of exception, marked No. 2 and made part hereof.

THE STATE OF LOUISIANA:

To all whom these presents may come, greeting:

Whereas Mrs. Eliza Delrach Pritchard, widow of Richard Pritchard, named and appointed testamentary executrix of the last will and testament of Richard Pritchard, deceased, has applied to the second district court for the parish of Orleans by petition, praying said court to grant letters testamentary therein:

Now, know ye that the said Mrs. Eliza Delrach Pritchard, widow of Richard Pritchard, is hereby authorized and empowered to collect all the goods and effects which were of said Richard Pritchard, deceased, and to make a just inventory thereof, and all other lawful acts to do and perform as testamentary executrix of the said last will and testament.

40 Witness our hands and the seal of said court this eighth day of August, in the year of our Lord one thousand eight hundred and seventy-seven, and the 101, of the Independence of the United States of America.

(Signed) A. L. TISSOT, *Judge.*
" FRANK PAW, JR., *Clerk.*
JOHN HERBERT, *Clerk.*

A true copy.

NEW ORLEANS, *June* 15, 1877.

Motion & order for writ of error. April term, 1879.—*Extract from the minutes.*

NEW ORLEANS, *Thursday, May 29th*, 1879.

Court met pursuant to adjournment.
Present, Hon. E. C. Billings, dist. judge.

MRS. ELIZA D. PRITCHARD, EX., *vs.* EX NORTON. } No. 8099.

On motion of Henry C. Miller and Branch K. Miller, of counsel for Mistress Eliza D. Pritchard, executrix of Richard Pritchard, the plaintiff herein, and on suggesting that she is advised that the judgment herein rendered on the 20th May, 1879, and signed on the

41 24th of May, 1879, in favor of defendant and against the plaintiff is erroneous to her prejudice, and that she desires to take a writ of error from said judgment—

It is now ordered that the said plaintiff be allowed a writ of error in this case, returnable to the Supreme Court of the United States on the second Monday of October, 1879, on giving bond and security conditioned as the law directs, in the sum of five hundred dollars.

Bond for writ of error.—Filed May 29th, 1879.

Know all men by these presents that we, Mistress Eliza D. Pritchard, executrix of R. Prichard, as principal, and John V. Moore, as surety, are held and firmly bound unto Ex Norton in the full and just sum of

five hundred dollars, to be paid to the said Ex Norton, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, our executors, administrators, jointly and severally by these presents. Sealed with our seals and dated this 29th day of May, in the year of our Lord
42 one thousand eight hundred and seventy-nine.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court wherein Mrs. Eliza D. Pritchard, executrix of R. Pritchard, is plaintiff, and E. Norton, is defendant, judgment was rendered against the said Mrs. E. D. Pritchard, executrix, and the said plaintiff, Mrs. E. D. Pritchard, executrix, having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Ex Norton citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, the 2d Monday of October next:

Now the condition of the above obligation is such that if the said Mrs. Elizabeth D. Pritchard, executrix, shall prosecute her writ to effect and answer all damages and costs if she fail to make plea good, then the above obligation to be void; else to remain in full force and virtue.

43 (S'd) ELIZA D. PRITCHARD, [L. S.]
Ex'x of R. Pritchard,
Per HENRY C. MILLER.
(S'd) JOHN. V. MOORE. [L. S.]

Sealed and delivered in the presence of—
(Signed) HENRY C. MILLER.

Approved.
(Signed) EDWARD C. BILLINGS,
Judge.

44 UNITED STATES OF AMERICA,

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 43 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial the case of Eliza D. Pritchard, ex'x, vs. Ex Norton, No. 8099 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 2d day of Sept., A. D. 1879.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, Edward C. Billings, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 2d day of Sept'r, A. D. 1879.

EDWARD C. BILLINGS, *Judge.*

45 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, or some of you, between Eliza D. Pritchard, executrix of the estate of Richard Pritchard, plaintiff, and Ex Norton, defendant, a manifest error hath happened, to the great damage of the said Eliza D. Pritchard, executrix of the estate of Richard Pritchard, as by her complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 29th day of May, in the *the* year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court
For the District of Louisiana.

(Indorsed:) United States circuit court. No. 8099. Eliza D. Pritchard, ex'x, &c., plaintiff in error, versus Ex Norton, defendant in error. Writ of error. Filed May 29th, 1879. F. B. Vinot, d'y cl'k.

46 THE UNITED STATES OF AMERICA,

Circuit court of the United States, district of Louisiana.

The President of the United States to Ex Norton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Eliza D. Pritchard, executrix of the estate of Richard Pritchard, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Eliza D. Pritchard, executrix of the estate of Richard Pritchard, as in said writ of of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Su-

preme Court of the United States, this 31st day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

EDWARD C. BILLINGS, *Judge.*

47 On the 6th day of June, 1879, personally appeared before me E. S. Curry, a deputy U. S. marshal for the district of Louisiana, and makes oath that he served a copy of the within citation in error on Ex Norton, defendant in error, as stated in his official return hereon.

E. S. CURRY,
Dy U. S. Marshal.

Sworn to and subscribed before me this 6th day of June, 1879.

F. B. VINOT,
U. S. Comm'r.

(Indorsed:) United States circuit court. No. 8099. Eliza D. Pritchard, executrix, &c., plaintiff in error, vs. Ex Norton, defendant in error. Citation.

Marshal's return.

Received May 30, 1879, by the U. S. marshal, and, on June 6th, 1879, I served a true copy of the within citation in error on Ex Norto, defendant in error, by handing the same to Vallé J. Rozien, his attorney of record, in person, in the city of New Orleans, district of Louisiana, the said Ex Norton being absen' from the district of Louisiana at the time of service.

E. S. CURRY,
Dy U. S. Marshal, District of Louisiana.

(Indorsement on cover:) No. 301. Eliza D. Pritchard, ex't'x of Richard Pritchard, dec'd., plaintiff in error, vs. Ex Norton. Louisiana C. C. U. S. Filed 7th October, 1879.

16724

Supreme Court of the United States.

No. 301. OCTOBER T., 1881.

ELIZA D. PRITCHARD, as Executrix,
Plaintiff in Error,
vs.
EX. NORTON.

Statement of Facts, and Points for Defendant in Error.

This action was brought in the Circuit Court, for the District of Louisiana.

The record discloses the following facts as material in a consideration of the legal questions designed to be presented by the writ of error.

On the 26th day of December, 1871, one Harrison brought an action in the State Court of Louisiana, against the New Orleans, Jackson and Great Northern Railroad company, to recover the sum of $100,000 damages for breach of a contract (f. 2).

That action was litigated, and on the 5th day of November, 1872, the plaintiff recovered a judgment for $38,876.20 (f. 2.)

The Railroad company, defendant, appealed from that judgment, and gave a bond on such appeal. Richard Pritchard, whose executrix is the plaintiff in error, joined in a bond upon the appeal taken by the Railroad company. This bond is dated 20th Nov. 1872 (f. 33).

On that appeal the judgment against the Railroad company was reduced to $7,500. Under execution on the judgment so reduced, the plaintiffs realized a part of the judgment, and on the 9th day of February, 1877, the sum of $4,776.60 remained unpaid. That sum Richard Pritchard was compelled to pay as one of the sureties on the bond for the Railroad corporation.

After Richard Pritchard and his associates had become bound under their bond on the appeal of the Railroad corporation, Ex. Norton, the defendant in error, on the 30th of June, 1874, executed a bond to Pritchard, set out at page 13 of the record.

This bond is in the penal sum of $55,000, and recites simply the following:

"*Whereas*, The aforesaid Richard Pritchard has signed an appeal bond as one of the sureties thereon, jointly and severally, on behalf of the defendant, appellant in the suit of J. P. Harrison, Jr., *vs.* The New Orleans, Jackson and Great Northern Railroad Co., No. 9,261 on the docket of the Seventh District Court for the Parish of Orleans."

The condition is to hold harmless and fully indemnify Pritchard against loss or damage arising from his liability as surety on the appeal bond.

The bond is entitled thus: *State of New York, County of New York.*

No connection appears between these bonds except the recital quoted above.

The defendant, Norton, by his answer, insisted that the bond executed by him was executed and delivered in the City of New York to Richard Pritchard, without any consideration passing from said Pritchard to him, and had no validity whatever (f. 18).

On the trial it was proved that the bond of Pritchard was not executed by him at the instance or request of Norton, and that no consideration passed from Pritchard to Norton upon the execution of the indemnifying bond above quoted.

The defendant, Norton, also put in evidence the provisions of the Revised Statutes of the State of New York, 2 Rev. Stat., p. 406, § 77, as follows:

"§ 77. In every action upon a sealed instrument, and where a set-off is founded upon any sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if the instrument were not sealed."

The next section provides that such defence, to be available, must be pleaded, which was done in this action.

In connection with the recital of this Statute, the bills of exception contain these words, "and it appearing by the bonds that the indemnifying bond was executed in New York."

The exceptions are taken to the charge of the Court, and include objections both to the instruction given and to its refusal to give other instructions asked for by the plaintiff.

The objections to the charge of the Court upon the foregoing facts, as appearing upon the bills of exception, are three in number:

First.—The instruction given upon request of the defendant, and against the objection of the plaintiff, that the indemnifying bond in respect to its validity and the considerations requisite to support it was to be governed by the law of New York and not of Louisiana.

Second.—The instruction given upon the request of the defendant, and against the objection of the plaintiff, that, if the jury believed from the evidence that the appeal bond was not signed by Pritchard at the instance and request of McComb and Norton, or of either, and that no consideration passed between Pritchard, and McComb and Norton for their executing the indemnifying bond, then the latter bond was void for want or absence of any consideration valid in law to sustain it. The liability of Pritchard, having been incurred prior to the execution of the bond of indemnity, and not having been assumed at the request of the obligors in the latter bond, was not a good and sufficient consideration to support the indemnity bond.

Third.—The refusal of the Court to charge at the request of the plaintiff in accordance substantially with his contention as just stated—that, if the jury found that the consideration of the indemnifying bond was the obligation assumed upon the execution by Pritchard of the appeal bond, and its object to indemnify him from loss under the appeal bond, such consideration was good and valid, and competent to support the action.

Such is a fair statement of the instructions and refusal of instruction excepted to. The same points precisely are suggested by the plaintiff's assignment of errors here.

It is submitted that the Court below was correct in its rulings.

I.—The indemnifying bond, is a collateral obligation, and having been given in the State of New York, by a resident of that State, at his place of residence, New York, and no place of payment

being specified in it, the question of its binding force and legal effect is to be determined by the law of that State.

A contract is always to be expounded with respect to its construction and validity according to the law of the place where it is made.

Story on Cont., § 653.
Pars. on Cont. (*5th Ed.*), *Vol.* 2, *pp.* 570–1.
Add. on Cont., 861.
Story on Confl. of Laws (*4th Ed.*), § 242.
Whart. on Confl. of Laws (*2d Ed.*), § 454, *and cases cited.*
Phill. Int. L., *vol.* 4, *p.* 616.
Savigny (*Guthrie's 2d Ed.*), 205, 227, 229.
In re Glyn, 15 *Bank'y Reg.*, 497, 501.

This principle has been laid down by this Court with so much definiteness as to render a citation of other authorities hardly excusable.

Scudder vs. *Un. Nat. Bk.*, 1 *Otto*, 406.

Even when a contract is by its terms to be performed partly in one State and partly in another, it has been held proper to construe it according to the law of New York where it was made.

Morgan vs. *N. O., M. & T. R.R. Co.*, 2 *Woods*, 224.

This case affords a clear exposition of the principle of construction according to the *lex loci contractus.*

The same principle is recognized by the Courts of Louisiana in *King* vs. *Harman's Heirs*, 6 *La., O., S.*, 607., where it is held that the rights of parties to bonds or obligations entered into in States where the Common Law prevails, must be determined by that system of jurisprudence.

In the present case, then, the recognition of this general principle brings us at once to the simple inquiry, what was the *locus contractus?*

This again is a question of fact upon which the record leaves slight ground of dispute. That the bond of indemnity upon which the action is brought was made in New York is established

(1) By the bond itself, which is entitled "*State of New York, County of New York,*" (ff. 34–35). A caption of this kind, prefixed to a bond, must be presumed to have been so prefixed for a purpose.

The only purpose of the parties in using a statement so uncommon, must have been to locate the place of the contract; they mean that the bond is to be treated as having been made in the County and State of New York.

(2) The bill of exceptions expressly states, "and it appearing by the bonds that the indemnifying bond was executed in New York" (f. 23).

This is a clear and definite admission that the *locus contractus* was New York.

The bill of exceptions is the paper of the appellant, and she is bound by it. It is an admission of record which she is not to be permitted to controvert or deny.

(3) Aside from the two facts above stated why the *place* of this contract must be held to be the State and County of New York, and if they were wanting, in the absence of other controlling circumstances, the fact that the respondent who is the party sued on this bond is described in it as a resident of New York, would be sufficient to fix that as *lex loci contractus.*

Where a person assumes an obligation at his own domicile the law of that domicile controls the contract.

Whart. Confl. of Laws (2*d Ed.*) § 410.
See Savigny (*supra.*)
Lloyd vs. *Guibert, L. R.*, 1 *Q. B.*, 115, 122.

An exception to this general rule can only arise where there is a place of performance designated expressly, or by necessary implication other than the domicile of the obligor. Such designation can arise only from *the intention of the parties.*

Wharton says that where a place of performance is not designated by the contract or exacted by the necessities of

the place, "the task is to discover what place the parties *contemplated* as the place of performance."

Confl. of Laws (2*d Ed.*), § 404.

In the present case there is no foundation for an implication that the obligors in the indemnifying bond intended to modify the general rule as before stated. The caption "State of New York, &c.," added to this bond, shows the contrary intention.

A contract for the payment of money, where no place of payment is designated, is always held to be a contract for its payment at the domicile of the party who is to pay.

Indeed it is the undisputed rule, that the domicile of the debtor supplies the local law applicable to all contracts except in these cases:

a. When the obligation *definitely* fixes the place of performance.

b. Obligations arising in connection with a continuous business as to which the seat of such business determines the local law.

c. When a debtor executes a contract at a place detached from his domicile, under such circumstances as lead to the inference that in such place they are to be performed.

Whart. on Confl. of Laws (2*d Ed.*), § 426.

None of these exceptions cover the present case, which therefore falls under the general rule.

The most familiar cases are those which have arisen on promissory notes.

If it be (as to a note) but a naked promise without any special condition as to place of payment, then it must be demanded of the maker where he is, or at his domicile, but it would be regarded as made where it was signed.

Pars. on Cont., Vol. 2, (5*th Ed.*), 583, 584, *note h.*

Kent Com., Vol. 2, *p.* 457.

Story on Confl. of Laws, § 272.

Chapman vs. *Robertson*, 6 *Paige*, 627.

This Court has stated as the law on this point:

"Provided no place is designated or agreed or indicated in the form of the address or the terms of the acceptance, the rule then is, that the presentment for payment must be made at the home or domicile of the acceptor or maker, or at his usual place of business, during business hours."

Cox vs. *Nat'l. Bank*, 10 *Otto*, 713.

A bond of indemnity is simply a contract for the payment of a sum of money in a certain contingency. It has no place of performance except that which may become such, at the domicile of the debtor against whom it is sought to be enforced. Such a bond is to be construed by the law of the place where it is made.

Add. on Cont., 861.

Sureties, endorsers and guarantors are, therefore, liable everywhere only according to the law of the place of *their own* contract, not the law governing the contract of the person for whom or to whom they become liable.

Burge on Suretyship (1*st Am. Ed.*), *pp.* 61, 74, 77, 297.
Burge Colonial and Foreign Laws, Vol. 3, *p.* 765.

A much stronger case than the present is that of the endorser of a promissory note who is held liable not according to the law of the place where the note is made, but only according to the law of the place where his endorsement is made.

Aymar vs. *Sheldon, et al.*, 12 *Wend.*, 439.

The argument submitted in behalf of the plaintiff in error, rests upon the assumption that because this contract was to indemnify Pritchard against loss as surety under a bond executed in Louisiana, where he lived and died, and where his liability on the appeal bond accrued; therefore, Louisiana is the place of performance of the bond sued upon, to such an extent as to require its validity to be determined by Louisiana rather than New York law.

No authority is cited to sustain the novel position that a contract of indemnity under which the sole liability possible

is the payment of money by the obligor, and no place of payment is nominated in the bond, is to be construed by any other law than that of the place where it is made.

(4) Upon the face of this bond, in the absence of any evidence on the subject, and disregarding altogether the caption, "*State of New York, County of New York,*" the presumption would be that the last signature affixed was that of the respondent. His name appears last in the body of the bond, and is presumed to have been affixed at his own domicile, therein recited to be in New York.

The place of the final execution determines the place of the contract. The place where the covenantor signs or executes a contract in writing is the place where it is made.

Whart. on Confl. of Laws, (2*d Ed.*), § 420.
Add. on Cont., 862.

II.—The record shows that the indemnifying bond was given without any consideration whatever. By the law of the place of contract and payment, the seal is simply *prima facie* evidence of consideration. The presumption can be rebutted by parol proof.

Under the law of New York this bond is, upon the facts of the case, void for want of consideration.

In many of the States it is held that even a sealed instrument is open to the defense of want of consideration. But in New York it is placed beyond question by the Statute, which provides, that in every action upon a sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner as if the instrument were not sealed, provided such defense be pleaded.

2 *New York R. S.* (*Edm. Ed.*), 406, *Sec.* 77.

Since the passage of this, the failure of consideration is a good defence to a sealed instrument. The effect of the Statute is that "in this respect there is now no distinction" between a contract with a seal or without one.

Case vs. *Boughton*, 11 *Wend.*, 106.

The effect of the Statute is thus well stated:

"The notion that there is greater solemnity in the execution of an instrument with a seal attached to it than without the seal, seems to be repudiated. The party is no longer estopped by his seal, from showing the truth; there is now no magic in a wafer. In respect to the consideration, all written contracts, whether sealed or unsealed, are placed upon the same footing; and any defense applicable to the one is equally applicable to the other."

Johnson vs. *Miln.*, 14 *Wend.*, 195.

Other cases to the same point are:

Russell vs. *Rogers*, 15 *Wend.*, 352.
Mann vs. *Eckford, Exrs.*, 15 *Wend.*, 502, 519.
Talmadge vs. *Wallis*, 25 *Wend.*, 106.
Wilson vs. *Bapt. Ed. Soc'y*, 10 *Barb.*, 308.
Averell vs. *Loucks*, 6 *Barb.*, 19, 25.

and authorities cited in the opinions in these cases.

See, also, Swift vs. *Hawkins*, 1 *Dall.*, 21.
Tenny vs. *Prince*, 4 *Pick.*, 387.
Matlock vs. *Gibson*, 8 *Rich.* (*Law*) *S. C.*, 439.
Peebles vs. *Stevens*, 1 *Bibb.*, 500.
Leonard vs. *Bates*, 1 *Blackf.*, 712.

III.—New York being the *locus contractus*, and such being the law of that State, the contract is before the Court as though without a seal. The presumption of a consideration afforded by the seal has been rebutted by evidence, and, upon the proof the obligation is without consideration and void—mere *nudum pactum.*

It was a voluntary bond, no consideration passed, the appeal bond against which it purported to indemnify the appellant's decedent was not signed by him at the instance or request of the respondent or his co-obligor (*ff.* 22–23, 30–31).

The sole fact recited by way of consideration is, that Pritchard had executed the appeal bond. It is therefore sought in this case to set up Pritchard's liability on this appeal bond, assumed by him without the request of Norton or McComb, and which had

been a subsisting liability long before the execution of the indemnity bond.

This was a past consideration, and wholly insufficient to support the obligation sued upon. Such an obligation must be alleged and proved to have been executed *at the request* of the promisor.

Story on Cont., § 571.
Smith vs. *Bartholomew*, 1 *Metc.*, 276.
Comstock vs. *Smith*, 7 *Johns.*, 87.
Leonard vs. *Vreedenburgh*, 8 *Johns.*, 29
Livingston vs. *Rogers*, 1 *Cai.*, 583.
Chaffee vs. *Thomas*, 7 *Cow.*, 358.
Parker vs. *Crane*, 6 *Wend.*, 647.
Tenney vs. *Prince*, 4 *Pick.*, 387.
See *Smith* vs. *Mudgett*, 20 *N. H.*, 527.

A contract to indemnify a surety in a bond, made after it has been executed, and without any new consideration, is void.

Jones vs. *Shorter*, 1 *Ga.*, 294.

The performance of an act which the party is under a legal obligation to perform, cannot constitute a good consideration for a promise.

Add. on Cont., 13–14.
Pars. on Cont. (*5th Ed.*), *Vol.* 1, *p.* 437.

and cases cited, note (i).

These propositions are now elementary.

Indeed, the argument for the appellant, by implication, admits that as a common law, the bond sued upon is *nudum pactum*. The contention is confined to the position that the obligation can be sustained under the civil law; and again the case of the appellant is rested upon the claim that the contract is to be construed under the law of Louisiana.

IV.—There is no equity in the claim of the plaintiff. Pritchard did not incur any new liability by reason of the receipt of this indemnify-

ing bond. He had become bound by his own undertaking nearly two years before the execution of that in suit, so that he neither lost or gained by the paper. The bond signed by Pritchard is dated 24th Nov., 1872, (f. 33), and there is no pretence that Norton had anything to do with his act. The paper on which this suit is brought is dated 30th June, 1874, (f. 35).

The judgment below should be affirmed.

7th April, '82

CEPHAS BRAINERD,
GEORGE H. BATES,
Of Counsel for Defendant in Error.

OFFICE SUPREME COURT U.S.
FILED
MAR 27 1922
JAMES H. MCKE

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UNITED STATES SUPREME COURT.

No. 301.

ELIZA D. PRITCHARD, EXECUTRIX OF RICHARD PRITCHARD,

vs.

EX. NORTON.

Brief for Eliza D. Pritchard, Executrix, Plaintiff in Error.

STATEMENT OF FACTS.

HENRY C. MILLER,
Attorney for Plaintiff in Error.

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UNITED STATES SUPREME COURT.

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Brief for Eliza D. Pritchard, Executrix, Plaintiff in Error.

STATEMENT OF FACTS.

Richard Pritchard became the surety of the New Orleans, Jackson and Great Northern Rail Road Company, on its appeal bond, furnished to stay the execution of the judgment recovered against the Company, in the suit of J. P. Harrison against said Company, the judgment being for thirty eight thousand eight hundred and seventy-six dollars and twenty cents, the bond being for an amount exceeding one-half the amount of the judgment. The bond was in accordance with Articles 575, 579 of the Louisiana Code of Practice. See bond attached to plaintiff's bill of exceptions, printed, record p. 10. The bond is made in favor of the Clerk of the Court, but its legal effect is, that it is a bond in favor of J. P. Harrison, the creditor in whose favor the judgment was rendered, in the suit in which the bond was furnished. See Louisiana Code of Practice, Art. 575. With that bond in force, and Richard Pritchard bound thereon as surety, for the Rail Road Company, on the 30th June, 1874, H. S. McComb, and the defendant in error, Ex. Norton, executed and delivered to Pritchard

consideration, to support the indemnifying bond given by Ex. Norton, the defendant, to secure Richard Pritchard against that liability, to which refusal to instruct, the plaintiff also excepted. See bill of exceptions, printed record, pp. 11, 12. This bill presents the reverse proposition to that given on this point, at defendant's request.

The instruction asked on behalf of plaintiff affirmed, that the liability existing on the appeal bond, when Ex. Norton executed his indemnity obligation to secure Pritchard, as surety on that appeal bond, was in itself, a good and sufficient consideration for the bond of indemnity, sued upon. The plaintiff not only excepted to the adverse proposition given on the defendant's request, but excepted to the refusal to charge, as requested by plaintiff, on this point. The charge asked by plaintiff, referred, of course, to the law of Louisiana, and the request for the instruction that the consideration was good and valid, naturally accompanied the exception, to the refusal to charge, that the Louisiana law governed.

The plaintiff's exceptions then present two questions: Does the law of Louisiana or of New York govern the obligation sued upon; and next, under the Louisiana law, is not the defendant's liability on the appeal, subsisting when the indemnity bond was given, a good consideration for that bond.

ARGUMENT.

The testimony showed, that the appeal bond, on which Pritchard was bound as surety, was executed in Louisiana, to secure a Louisiana judgment; that Pritchard, the surety, lived and died here; that it was here his liability on that bond arose, and here he was compelled to meet it, by payment of the amount, for the recovery of which, with interst, his executrix now sues. The indemnifying obligation of the defendant, Ex. Norton, promised indemnity to Richard Pritchard, of New Orleans, his executors and administrators and assigns, against all loss or damage arising from his liability on that bond. Thus, the defendant's obligation was to indemnify a Louisiana surety, against a Louisiana obligation, by him incurred, to be enforced against him here, in Louisiana, where it was actually

enforced, as stated in the bill. Printed Record, pp. 11, 12. The indemnity must be deemed to be due, where Pritchard resided, and where that loss was sustained, which the defendant, by his bond, was bound to repair. The place of performance of the indemnity obligation of defendant, must be held to be in Louisiana. Although, that obligation was given in New York, Louisiana was the place of performance intended. Where an obligation is executed in one place, expressly or tacitly to be performed in another, then the contract as to its validity, nature and obligation is to be governed by the law of the place of performance.

Story's Conflict of Laws, S. 280, 304, 318.

2d Kent's Commentary, S. P. 459.

Beirne vs. Patten, 17th Louisiana Reports, 592.

Now as to the question of the consideration of the indemnifying bond. The New Orleans, Jackson and Great Northern Railroad Company was the judgment debtor of J. P. Harrison; and Pritchard was bound as the surety of the Railroad Company, on their appeal bond in favor of Harisron. See appeal bond, plaintiff's bill, printed record, p. 10. In that posture Ex. Norton, the defendant, on the basis of that subsisting liability, bound himself to endemnify Pritchard, against loss or damage, arising out of his liability, as surety on the appeal bond for the Railroad Company. It is not necessary, under the law of Louisiana to bind the defendant, Ex. Norton, that he should have received any consideration, for signing the indemnity bond. It was enough, to sustain the indemnity bond, that when it was given, there was a subsisting liability, on which the indemnity obligation, was founded. The Railroad Company was bound on the judgment, and on the appeal bond. Pritchard was bound as their surety. The indemnity bond was based on that liability. It promised Pritchard, indemnity against that liability. That was enough, under the Louisiana law. When Pritchard subsequently was compelled to pay the amount sued for, in satisfaction of that liability, against which he held defendant's obligation, he had the right to avail himself of the defendant's obligation of indemnification, as he seeks to do on the action.

The civil law sustains the obligation, when there is a valid cause for it. It uses the word "cause" in the sense of "motive or consideration" for the contract. The civil law, gives no effect to the supposed obligation "with a false or unlawful cause," or when "*contra bonos mores*," or when the consideration was expected to exist, but did not, or "when it fails." It sustains the agreement, when there is a cause for it, although that cause be not expressed, or is different from that expressed. See Civil Code of Louisiana of 1870, Articles 1893 to 1960. With these provisions, the civil law leaves the subject of contracts, to the particular agreements that parties may make. Any consideration not within the prohibitions of the Code, will sustain the obligation. The greater latitude upon the subject, under the civil law, is further illustrated by the fact that the law of Louisiana discards as a fiction unknown to the civil law, the requisite of a small pecuniary consideration, to support the obligation. See Mouton vs. Halsted, 1st Louisiana Annual Rep. p. 192. The difference between the civil law and the common law in respect to the subject, is sufficiently illustrated by the articles of its Code cited, and by reference to Story on contracts, § 433, which epitomises the common law on the subject.

It is accordingly been held by the Louisiana Courts, that the debt of another was in itself, a sufficient consideration to sustain an obligation. Thus, in any early decision of the Supreme Court of Louisiana, the defendant was sued upon his promise to pay the debt of another, no other consideration existing to sustain the promise, than the debt. The Court sustained the action, and made defendant liable on his promise, the Court holding that the question of law raised on the want of consideration, for promise must be determined in favor of defendant, the debt of another being a sufficient consideration to support a suretyship or a promise to pay it. See Flood vs. Thomas, 5th Martin's New Series Louisiana Reports, p. 562.

So, in another case, the obligation, based on the debt of another, existing when the obligation was incurred, failed for want of proof. The Court, however, observed, that the debt due by another, is a sufficient consideration on which to base a

promise to pay, but the promise must be freely made. See the N. O. Gas Company vs. Paulding, 12th Robinson's Louisiana Rep., p. 378.

So again, the defendant sued upon his engagement to pay the debt of another, no consideration existing for his engagement save that debt, was made liable, the Court holding to make a contract of this nature to pay the debt of another valid, it is only requisite to show, the pre-existence of the debt which defendant has promised to pay to him who is the creditor. This is the pact *constitutæ pecuniæ*, and requires no further consideration or foundation than the original debt. The New Orleans and Carrollton Rail Road Company vs. Chapman. 1st Louisiana Annual Report, p. 98.

It can make no difference in principle, that the promise in the cases cited, was made to the creditor, and in the case at bar was made to the surety of the debtor. In either case, there was a subsisting liability to serve, as the basis for the obligation. It is enough, that under the Louisiana law, a promise to pay, is binding when based upon an existing liability. The defendant's promise to pay the creditor of the Company, would be binding because based upon the debt of another, without any other consideration. So the promise is equally binding, when made as in the case here, to the surety of the debtor. It promised the surety indemnity, for his existing liability, if he was compelled to pay the debt. The surety can sustain the action quite effectively as the creditor himself could have enforced a promise to him, of payment, if the debtor did not. The cases settle, that no other consideration than an existing indebtedness or liability of another as requisite to sustain an obligation. That is enough, to dispose of the defense in this case.

But to go further, the Supreme Court of Louisiana has maintained the validity of an indemnifying bond, given to hold harmless, the surety of the debtor. It was the case of the defendants binding themselves to protect the surety against his obligation as surety. That is the case here. See Keane vs. Goldsmith, Haber & Co., 12th Louisiana Annual Report, p. 500. Nor is that case less authoritative, because the surety without

payment of the debt, assigned his right on the indemnity bond, to the creditor, who enforced it, under the assignment. It was enforced, because the contract of indemnity, was valid. It was enforced, before the surety had paid. Here the contract of indemnity is of the same nature, based upon the same consideration, and the surety in whose favor it was given, has actually paid. His right to recovery under the law of Louisiana, must be declared complete.

All that the Louisiana law requires is, that the promise to pay the debt of another shall be freely made (12th Robinson's Rep., 378), and that it shall be in writing, Revised Statutes of Louisiana S., 1443. Both requisites are supplied in this case.

Again the Code provides that surety may be given not only for the principal debtor, but for the surety—the case here.

Civil Code of La., Art. 3007.

McKerall vs. McMillan, 9th Rep., p. 19.

It is respectfully submitted, that the Court erred in the instruction that the indemnity bond was to be governed by the law of New York, and also erred in charging that the bond sued upon, was void for want of consideration. The judgment should be reversed.

Respectfully submitted,

HENRY C. MILLER,

Attorney for Plaintiff in Error.